(27,998)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 641.

EVELYN P. FERRY, APPELLANT,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND CENTRAL TRUST COMPANY OF NEW YORK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1921.

No. 3472

United States

Circuit Court of Appeals

For the Ninth Circuit.

EVELYN P. FERRY,

Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Names and Addresses of Attorneys of Record.

CHARLES HALDANE, 64 Wall Street, New York, and JAMES G. WILSON and GEORGE B. GUTHRIE, 309 Platt Building, Portland, Oregon,

For the Appellant.

CAREY & KERR and OMAR C. SPENCER, Yeon Building, Portland, Oregon,

For the Appellees.

Citation on Appeal.

#E.—8478.

United States of America,
District of Oregon,—ss.

To Spokane, Portland & Seattle Railway Company, and Central Trust Company of New York, Defendants and Respondents, GREETING:

WHEREAS, Evelyn P. Ferry complainant and appellant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice

should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, Oregon, in said District, this 4th day of March, in the year of our Lord one thousand nine hundred and twenty.

R. S. BEAN,
Judge. [1*]

Service by copy of the within citation is admitted at Portland, Oregon, this 4th day of March, 1920.

C. A. HART,
Of Respondents' Solicitors.

[Endorsed]: No. E.–8478. United States District Court, District of Oregon. Evelyn P. Ferry, Complainant, vs. S. P. & S. Ry. Co. et al, Defendants. Citation on Appeal. U. S. District Court, District of Oregon. Filed Mar. 4, 1920. G. H. Marsh, Clerk.

In the District Court of the United States for the District of Oregon.

July Term 1919.

BE IT REMEMBERED, that on the 31st day of July, 1919, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint, in words and figures as follows, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Oregon.

No. E.–8478.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Bill of Complaint.

To the Judges of the District Court of the United States for the District of Oregon:

Evelyn P. Ferry, of the city of New York, and a citizen of New York, brings this her bill against Spokane, Portland & Seattle Railway Company, a corporation duly organized under and by virtue of the laws of the State of Washington and a citizen of said State of Washington, and the Central Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York, wherein the said Evelyn P. Ferry demands of the said Spokane, Portland & Seattle Railway Company and Central Trust Company of New York, the reasonable or just one-half part whereof the said Evelyn P. Ferry is dowable according to law and the true intendment thereof in the following lands and tenements, to wit:

Lot 3 of Block 198 of Couch's Addition to the City of Portland according to the duly recorded maps and plats thereof as shown by the public records of Multnomah County, State of Oregon.

Whereupon your complainant and oratrix complains and says:

I.

That the jurisdiction of this court is based upon and depends upon the following grounds: [3]

(a) This is a suit arising under the Constitution and laws of the United States of America in this: That defendant's denial of complainant's claim of dower, and defendants' assertion of freedom from complainant's dower estate is based and founded upon a certain entry made in the District Court of the Second Judicial District of Washington Territory, by the terms of which entry the said District Court of the Second Judicial District of Washington Territory ordered and decreed a certain judgment of divorce by the terms of which it is now claimed and asserted complainant's estate of dower was determined and settled; that the validity of said entry of said court and the alleged decree and judgment is by the complainant denied, and the jurisdiction of said court is denied, whereby is drawn in question the faith and credit to be given said entry of divorce within the meaning and intendment of the Constitution and laws of the United States of America; that the value or amount of the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00); that the real es-

tate made the subject of this suit is situate within the District of Oregon;

(b) This is a suit arising under the Constitution of the United States of America in this: That defendants assert a freedom of dower under and by virtue of the laws of the State of Oregon by reason of statutes of said State of Oregon, by the terms of which a nonresident widow is endowed with an [4] estate in the lands of which her deceased husband was seized at the time of his death, and that other and further statutes of the State of Oregon grant an estate of dower unto resident widows in the lands of which a deceased husband was seized during coverture and not otherwise lawfully barred; that by reason of the denial to complainant of the estate of dower granted by the statutes of the State of Oregon unto resident widows, complainant is as a nonresident denied the privileges and immunities of a citizen within the meaning and intendment of the Constitution of the United States of America; that the lands made the subject matter of this suit are situate within the District of Oregon; that the value or amount involved in this controversy exceeds exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

That your complainant and oratrix is the widow of Clinton P. Ferry, who died in the city of San Diego, California, on the 31st day of July, 1909; that your oratrix and said Clinton P. Ferry were married at Stockton, in the State of California, on the 15th day of April, 1879, and that the said Clinton P. Ferry re-

mained until his death the lawful husband and spouse of your oratrix; that during the coverture of said Clinton P. Ferry with your oratrix, said Clinton P. Ferry was seized of an estate in fee simple in the lands and tenements hereinbefore described and made the subject of this suit, and remained seized of the same until the 26th day of September, 1905, when the said Clinton P. Ferry made, executed, and delivered unto the Security Savings & Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, a certain warranty deed, by the terms of which warranty deed said Clinton P. Ferry purported to convey an estate in fee simple in the said lands unto said Security Savings & Trust Company, all as more fully appears of record at page 452 of volume 342 of the records of deeds of Multnomah county, State of Oregon; [5] that notwithstanding said deed of conveyance purported to convey a fee-simple title of said Clinton P. Ferry to the said Security Savings & Trust Company yet so it is as your oratrix will give and show at the trial of this cause, your oratrix did not join in said deed of conveyance with her said husband, Clinton P. Ferry, nor in any subsequent deed or release, nor in any other manner has your oratrix conveyed or released her right of dower in and to said premises hereinbefore described, unto any one holding an estate of inheritance therein or any other estate.

III.

That on or about the 21st day of July, 1906, by a certain bargain and sale deed executed by the said

Security Savings & Trust Company, as is more fully set forth at page 323 of volume 365 of the Records of Deeds of Multnomah County, said Security Savings & Trust Company purported to convey unto defendant Spokane, Portland & Seattle Railway Company, whose corporate name was then Portland & Seattle Railway Company, all and singular its estate in the premises; that defendant Spokane, Portland & Seattle Railway Company subsequently took possession of the same and is now in the actual and open possession of the same, and claims its title to the same in fee simple and free from any claim or right on the part of your complainant and oratrix; that the said lands comprise a portion of the property of the defendant used for railroad purposes and is in continuous use of said defendant in violation of the rights of your oratrix.

IV.

That on or about the 4th day of March, 1911, defendant Spokane, Portland & Seattle Railway Company executed a certain Deed of Trust or Mortgage in favor of the defendant Central Trust Company of New York, by the terms of which the defendant Spokane, Portland & Seattle Railway Company conveyed, with other real, personal and mixed estate, the premises hereinbefore described, as security for a loan of One Hundred Twenty-five Million ($125,000,000) Dollars, bearing interest, as more [6] fully appears at page 278 of volume 415, of the Mortgage Records of Multnomah county, State of Oregon; that said mortgage has not been released of record and is now a record lien against the property

and constitutes a cloud upon the title of the same and the rights of complainant in and to the same; that heretofore and on or about the —— day of ——, 1916, your oratrix demanded of defendant in possession, Spokane, Portland & Seattle Railway Company, that defendant set off unto your oratrix the reasonable and just one-half of the said lands and tenements hereinbefore described, whereof by law she is dowable, and that her rights to the same and to the rents, uses, and profits of the same be recognized and accounted for by said defendant, but to do the same the said defendant in possession has wholly failed, refused and neglected.

V.

That your complainant and oratrix, as the surviving widow of said Clinton P. Ferry, is by the true intendment of the law, entitled to be endowed in the full one-half portion of the lands hereinbefore described; that no administration of the goods and lands of her deceased husband, Clinton P. Ferry, has been had in Multnomah county, State of Oregon, nor as to the lands in question can any such administration be had; that your oratrix is therefore without her remedy in the probate court for a summary admeasurement of dower; that your oratrix has no plain, speedy, adequate, or any remedy at law in the premises; that the above-described Deed of Mortgage constitutes a cloud upon the title of your complainant and oratrix in and to the premises, and that your oratrix is entitled to an accounting from the defendants of the rents, uses, and profits of the said real estate from and since the 31st day of July, 1909;

that all and singular the matters and things hereinbefore related are within the ancient, honorable, and equitable jurisdiction of courts of chancery and of this Honorable Court. [7]

WHEREFORE your oratrix humbly prays that your Honors may be pleased to decree unto her the reasonable or just one-half part of said lands and tenements hereinbefore described, and to that end that your Honors shall appoint three discreet persons of the community as commissioners for the purpose of such admeasurement in metes and bounds, if the same shall be practicable according to the usages and practices of statutes in dower; that your Honors shall decree the sale of the said property and set off unto your oratrix such portion of the purchase price as she may be in equity entitled to in lieu of her dower estate; that your Honors shall in the event of a division of metes and bounds order and require that the defendant Central Trust Company of New York release unto your oratrix such portion as may be to her set off as free and clear of the lien created by its mortgage or Deed of Trust of date March 4, 1911, or in lieu thereof and in the event that the premises be sold, that your Honors shall decree such portion of the proceeds of said sale as lawfully belonging to your oratrix, as free and clear of any lien in favor of said defendant, Central Trust Company of New York; that your Honor shall, in the event of admeasurement by metes and bounds, let your oratrix into possession by proper writs, and as to the rents, uses, and profits of the said lands and tenements from and since the 31st day of July, 1909, your

Honors shall be pleased to decree unto your oratrix an accounting from the defendants her just share as she may have been kept out of possession and use of the same, and your oratrix further prays for such other and further relief as may to your Honors seem just and equitable, and being denied possession of her lands and tenements upon demand therefor, your oratrix would further pray [8] for her costs and your oratrix will ever pray.

CHARLES HALDANE,
WILSON & GUTHRIE,
Solicitors for Complainant.

United States of America,
District of Oregon,—ss.

James G. Wilson, being first duly sworn, deposes and says, that he is the duly authorized agent and attorney for complainant, Evelyn P. Ferry; that he is familiar with the matters and things related in her above bill of complaint and that he has read the same, known the contents thereof, and that the matters and things therein related are true as he verily believes; that he makes this verification for the reason that said complainant is without the District of Oregon.

JAMES G. WILSON.

Subscribed and sworn to before me this 31st day of July, 1919.

[Seal] A. HOVDE,
Notary Public for Oregon.

My commission expires March 30, 1923.

Filed July 31, 1919. G. H. Marsh, Clerk. [9]

AND AFTERWARDS, to wit, on the 18th day of August, 1919, there was duly filed in said court a motion to dismiss the bill of complaint, and notice thereon, in words and figures as follows, to wit: [10]

In the District Court of the United States for the District of Oregon.

No. 8478.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Motion to Dismiss Bill of Complaint.

To the Honorable Judges of the District Court of the United States for the District of Oregon:

Now comes Spokane, Portland and Seattle Railway Company, one of the defendants in the above-entitled suit, and enters its appearance herein, and moves the Court to dismiss the bill of complaint filed in this cause for the reason that said bill does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle the plaintiff to any relief against this defendant.

WHEREFORE, this defendant prays judgment of this court whether it shall further answer, and that defendant be dismissed, with its costs and disbursements.

CAREY & KERR,

Solicitors for Defendant Spokane, Portland and Seattle Railway Company. [11]

In the District Court of the United States for the District of Oregon.

No. 8478.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Notice of Motion to Dismiss Bill of Complaint.

To the Above-named plaintiff, Evelyn P. Ferry, and to Messrs. Charles Haldane and Wilson & Guthrie, Solicitors for the said Plaintiff.

You are hereby notified that on the hearing of the motion to dismiss the bill of complaint in this suit, the defendant Spokane, Portland and Seattle Railway Company will rely upon the following points:

First: That it appears from the bill of complaint

that the husband of the plaintiff did not die seized of the real property described therein, and it does not appear that the plaintiff resided in the State of Oregon at the time of his death.

Second: That it appears from the said bill of complaint that the plaintiff's claim is stale and that by reason of laches and want of equity, she is not entitled to the relief as prayed.

CAREY & KERR,
Solicitors for Defendant Spokane, Portland and Seattle Railway Company.

State of Oregon,
County of Multnomah,—ss.

Due service of the within motion to dismiss is hereby accepted in Multnomah county, Oregon, this —— day of August, 1919, by receiving a copy thereof, duly certified to as such by Chas. H. Carey, of attorneys for defendant Spokane, Portland and Seattle Railway Company.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

Filed August 18, 1919. G. H. Marsh, Clerk. [12]

AND AFTERWARDS, to wit, on Monday, the 27th day of October, 1919, the same being the 97th judicial day of the regular July term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [13]

In the District Court of the United States for the District of Oregon.

October 27, 1919.

No. E.–8478.

EVELYN P. FERRY.

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation.

Order Allowing Motion to Dismiss Bill of Complaint.

Now, at this day, this cause comes on to be heard, upon the motion of the defendants to dismiss the bill of complaint herein, said plaintiff appearing by Mr. George B. Guthrie, of counsel, and the defendants by Mr. Omar C. Spencer, of counsel. Upon consideration whereof it is ORDERED that said motion be had the same is hereby allowed, and that the bill of complaint herein be and the same is hereby dismissed,and that the defendants do have and recover of and from said plaintiff their costs and disbursements taxed herein at $10.45, and that execution issue therefor.

CHAS. E. WOLVERTON,
Judge.

Filed October 27, 1919. G. H. Marsh, Clerk.
[14]

AND AFTERWARDS, to wit, on the 3d day of March, 1920, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [15]

In the District Court of the United States for the District of Oregon.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Petition for Appeal.

The complainant, Evelyn P. Ferry, conceiving herself to be aggrieved by that certain order of dismissal entered on, to wit, the 27th day of October, 1919, doth hereby appeal from said order unto the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and she prays that this her appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made may be duly authenticated by the clerk and sent unto the said Honorable United States Circuit Court of Appeals for the Ninth Circuit of the

United States at San Francisco in the State of California.

CHARLES HALDANE,
64 Wall St., New York, N. Y.
JAMES G. WILSON,
GEO. B. GUTHRIE,
309 Platt Building, Portland, Ore.,
Solicitors for Complainant.

Filed March 3, 1920. G. H. Marsh, Clerk. [16]

AND AFTERWARDS, to wit, on the 3d day of March, 1920, there was duly filed in said court an assignments of error, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

No. E.–8477.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Assignments of Error.

Comes now Evelyn P. Ferry, complainant herein, by her solicitors, and makes her assignments of er-

ror in the above-entitled suit, and says there is manifest error in the record in the following particulars:

I.

That the Court erred in allowing defendants' motion to dismiss the bill of complaint, in holding that complainant, a citizen and resident of the State of New York, was not entitled to dower in the lands described in said bill, of which lands complainant's husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and complainant's dower not otherwise lawfully barred), and in holding the Oregon laws (section 7306, L. O. L.) which limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, to be valid and constitutional notwithstanding the Oregon laws (section 7286, L. O. L.) which entitle the widow of every deceased person to an estate of dower in such lands, and notwithstanding the provisions of section 2 of Article IV of the Constitution of the United States of America, which entitle the citizens of each State to all the privileges and immunities of the citizens of the several states.

II.

That the Court erred in refusing to deny defendant's motion to dismiss the bill of complaint, and in refusing to hold that complainant, a resident and citizen of the State of [18] New York, was entitled to an estate of dower in the lands described in said bill of complaint, of which lands her husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and complainant's right of dower not otherwise lawfully barred) pur-

suant to the provisions of the laws of Oregon (section 7286, Lord's Oregon Laws).

III.

That the Court erred in refusing to deny defendants' motion to dismiss the bill of complaint, and in refusing to hold invalid and unconstitutional the Oregon laws (section 7306, L. O. L.), which purport to limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, as repugnant to the provisions of section 2 of Article IV of the Constitution of the United States of America.

CHARLES HALDANE,
JAMES G. WILSON,
GEO. B. GUTHRIE,
Solicitors for Evelyn P. Ferry

Filed March 3, 1920. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on Wednesday, the 3d day of March, 1920, the same being the 3d judicial day of the regular March term of said court — Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding —the following proceedings were had in said cause, to wit: [20]

In the District Court of the United States for the District of Oregon.

No. E–8478.

No. E.–8478.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants.

Order Allowing Appeal.

Upon application of solicitors for complainant and the filing of complainant's petiton for appeal on this 3d day of March, 1920, it is ORDERED that the appeal of Evelyn P. Ferry, complainant herein, to the Honorable United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed as prayed for, upon her filing her undertaking on appeal in the sum of Two Hundred and Fifty Dollars.

R. S. BEAN,

District Judge of the United States for the District of Oregon.

Portland, Oregon, March 3, 1920.

Filed March 3, 1920. G. H. Marsh, Clerk. [21]

AND AFTERWARDS, to wit, on the 3d day of March, 1920, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [22]

In the District Court of the United States for the District of Oregon.

EVELYN P. FERRY (a Citizen of the State of New York),

Complainant and Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and CENTRAL TRUST COMPANY OF NEW YORK, a New York Corporation,

Defendants and Respondents.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Evelyn P. Ferry, complainant and appellant, and National Surety Company, a corporation of New York, as surety, are held and firmly bound unto Spokane, Portland & Seattle Railway Company, a Washington corporation, and Central Trust Company of New York, a New York corporation, in the sum of Two Hundred and Fifty Dollars, to be paid to said defendants and respondents, their successors and assigns; to which payment we do bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of February, 1920.

WHEREAS, the above-named Evelyn P. Ferry has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and decree of dismissal in the above-entitled cause entered by the District Court of the United States for the District of Oregon.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named Evelyn P. Ferry shall prosecute said appeal to effect, and answer all costs that may be awarded against her, if she shall fail to make good her plea, then this obligation shall be void; otherwise in full force and virtue it shall remain.

[Seal] EVELYN P. FERRY,
By JAMES G. WILSON,
One of Her Solicitors.

NATIONAL SURETY COMPANY,
By CLARENCE D. PORTER,
Its Attorney in Fact. [23]

Signed, sealed and delivered in our presence.
GEO. B. GUTHRIE.
A. HOVDE.

Approved March 3, 1920.
R. S. BEAN,
Judge.

Filed March 3, 1920. G. H. Marsh, Clerk. [24]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing order allowing appeal, do hereby certify that the foregoing pages numbered from 2 to 24, inclusive, constitute the transcript of record upon appeal in the case in which Evelyn P. Ferry is complainant and appellant, and Spokane, Portland and Seattle Railway Company, a Washington corporation, and Central Trust Company of New York, a New York corporation, are defendants and appellees, and that the foregoing pages contain a true and correct transcript of all of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is $6.50, and that the same has been paid by said appellant.

WITNESS my hand and the seal of said court at Portland, in said district, this 25th day of March, 1920.

[Seal] G. H. MARSH,
Clerk. [25]

[Endorsed]: No. 3472. United States Circuit Court of Appeals for the Ninth Circuit. Evelyn P. Ferry, Appellant, vs. Spokane, Portland & Seattle Railway Company and Central Trust Company of New York, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 27, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Endorsed:] Printed Transcript of Record. Filed April 5, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEAL FOR THE NINTH CIRCUIT.

Names and Addresses of Attorneys of Record.

For Appellant:

James G. Wilson and George B. Guthrie, 309 Platt Building, Portland, Ore.
Charles Haldane, 64 Wall Street, New York, N. Y.

For Appellees:

Messrs. Carey & Kerr and Omar C. Spencer, 1410 Yeon Building, Portland, Ore.

At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the Seventh Day of May, in the Year of Our Lord One Thousand Nine Hundred and Twenty.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

No. 3473.

EVELYN P. FERRY, Appellant,

vs.

HENRY L. CORBETT et al., Appellees.

Order of Submission.

Ordered appeals in the above entitled causes argued by Mr. George B. Guthrie, counsel for the appellant, and by Mr. Joseph Simon, counsel for the appellees in case No. 3473, counsel for the appellees in case No. 3472 submitting on brief on file, and submitted to the Court for consideration and decision.

At a Stated Term, to wit, the October Term, A. D. 1919, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the Sixth Day of July, in the Year of Our Lord one Thousand Nine Hundred and Twenty.

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.
The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the causes were heard, Ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the causes in accordance with the opinion filed therein: * * *

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

Opinion U. S. Circuit Court of Appeals.

James G. Wilson, Geo. B. Guthrie and Charles Haldane, for the Appellant.

Charles H. Carey, James B. Kerr and Omar C. Spencer, for the Appellees.

Before Gilbert, Ross and Hunt, Circuit Judges.

GILBERT, *Circuit Judge:*

The appellant brought a suit to establish her alleged dower rights in certain real estate in the State of Oregon, the title to which had stood in the name of her former husband, but which he had sold and conveyed without her signature to the deeds. The court below sustained a motion to dismiss the bill. The appellant concedes that the bill shows that at the time of her husband's death and at the time of the conveyances she was a non-resident of the State of Oregon. A statute of the state in force since 1854 provides: "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized." The statute was taken from the laws of Michigan, there adopted in 1846. In Pratt v. Tefft, 14 Mich. 191, the Supreme Court of Michigan construing the statute held that one of its purposes was to provide that a woman might bar her dower by non-residence, and that woman residing out of the state at the time of her husband's death was not entitled to dower of lands in the state of which he had been seized but which he had conveyed without her joining in the deed. That construction was reaffirmed in Ligare v. Semple, 32 Mich. 438, and again in Stringer v. Dean, 61 Mich. 203. Wisconsin also adopted the Michigan statute, and in Bennett

v. Harms, 51 Wis. 251 it was held that a woman who was not a resident of the state at the time of her husband's death was not entitled to dower in lands which he conveyed during the marriage without her signature, and that the non-residence intended was a non-residence at the time of the husband's death and not at the time of his conveyance of the land. In Ekegren v. Marcotte, 159 Wis. 539, the former decision was modified and it was held that the words "residing out of this state" referred not to the time of the husband's death but to the time of the conveyance. In Thornburn v. Doscher, 32 Fed. 810, in construing the Oregon statute, Judge Deady followed the decisions of Michigan and Wisconsin, and held that a woman not a resident of the state was not entitled to dower in the lands therein of which her husband did not die seized. That construction was accepted by the Supreme Court of Oregon in Cunningham v. Friendly, 70 Or. 222. Nebraska also had adopted the statute, and it has there received the same construction as in the states before mentioned. Atkins v. Atkins, 18 Neb. 474; Miner v. Morgan, 83 Neb. 400; Burr v. Finch, 91 Neb. 417. A statute of Kansas, creating an interest in the nature of dower, provided "that the wife shall not be entitled to any interest under the provisions of this section in any land to which the husband has made conveyance, when the wife, at the time of the conveyance, is not or never has been a resident of this state." In Buffington v. Grosvenor, 46 Kan. 730, the court followed the decisions in Michigan, Wisconsin, and Nebraska, and denied dower to a non-resident wife.

But it is contended that the Oregon statute is unconstitutional in that it is repugnant to Sec. 2, Art. IV of the Fourteenth Amendment. Corfield v. Coryell, 4 Wash. C. C. 371, is cited, in which it was said: "The inquiry is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign." The same constitutional objection was made in several of the decisions to which we have referred. In Bennett v. Harms it was held that a non-resident wife's expectancy of dower being inc*oh*ate was under the absolute control of the state legislature, and that the legislature was not prevented from discrimination against those who were not citizens or residents. In Buffington v. Grosvenor, the court followed Connor v. Elliott, 18 How. 591, where it had been held that a statute of Louisiana which discriminated in favor of women who contracted marriage within the state, or who contracted marriage out of the state and afterwards went there to live, had no connection with the privileges and immunities provision of the Constitution.

The statute of Oregon was primarily a provision to regulate the conveyance of real estate within the then territory of Oregon, and we may assume that its adoption was inspired by a principle of public policy, having in view the vast distance between the territory and

the eastern states whence immigration came, the difficulty of communication, the difficulty of ascertaining whether a resident of the territory had a wife "back in the States", and the difficulty of obtaining her signature in case she were known. The appellant cites decisions from the State of California, such as In re Stanford's Estate, 126 Cal. 112, which hold that where a state imposes upon the citizens of another state a tax upon their right of inheritance which it does not impose upon its own citizens, the law is invalid under the provisions of the Fourteenth Amendment. It is contended that in principle such a discrimination is not distinguishable from that which is created by the Oregon statute in question here. But we think that the right of dower stands upon a different footing from the right of inheritance. "Dower is not the result of any contract between the husband and the wife, either express or implied, but it is an institution of the state, founded upon public policy, and made by positive law and incident of the marriage relation." 19 C. J. 460. During coverture the dower right is a mere inc*oh*ate right, which may be abridged or taken away at any time before the husband's death. "It is not a natural right. It is wholly given by law and the power that gave it may increase, diminish, or otherwise alter it or wholly take it away." Randall v. Kreiger, 23 Wall. 137. On the other hand "the general consent of the most enlightened nations has, from the earliest historical period recognized a natural right in children to inherit the property of their parents." United States v. Perkins, 163 U. S. 625, 628. In Thornburn v. Doscher, Judge Deady said: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other as an incident of the relation between them. It may give or withhold dower altogether." The legislature having this power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and if so, it has the right to provide that it may be barred by the wife's non-residence in the state. This view of the main question leaves it unnecessary to consider the question of laches in bringing the suit.

The decree is affirmed.

Endorsed: Opinion; Filed July 6, 1920, F. D. Monckton, clerk, by Paul P. O'Brien, deputy clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

Decree.

Appeal from the District Court of the United States for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[Endorsed:] No. 3472. United States Circuit Court of Appeals for the Ninth Circuit. Evelyn P. Ferry vs. Spokane, Portland & Seattle Railway Company, et al. Decree. Filed and entered July 6, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY (a Citizen of the State of New York), Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and Central Trust Company of New York, a New York Corporation, Appellees.

Petition for Appeal.

The Appellant, Evelyn P. Ferry, conceiving herself to be aggrieved by that certain decree entered on to wit, the 6th day of July, 1920, affirming a decree of the District Court of the United States for the District of Oregon, and dismissing her bill of complaint, doth hereby appeal from said decree unto the Honorable Supreme Court of the United States, and she prays that this, her appeal, may be allowed

and that a transcript of the record and proceedings and papers upon which said decree was made may be duly authenticated by the Clerk and sent unto the said Honorable Supreme Court of the United States at Washington in the District of Columbia.

(Sgd.) CHARLES HALDANE,
64 Wall St., New York, N. Y.,
(Sgd.) JAMES G. WILSON,
(Sgd.) GEO. B. GUTHRIE,
508 Platt Bldg., Portland, Oregon,
Solicitors for Appellant.

[Endorsed:] Petition for appeal to Supreme Court U. S. Filed September 29, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY (a Citizen of the State of New York), Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and Central Trust Company of New York, a New York Corporation, Appellees.

Assignment of Errors.

Comes now Evelyn P. Ferry, Appellant herein, by her solicitors, and makes her assignment of errors in the above-entitled suit, and says there is manifest error in the record in the following particulars:

I.

The Court erred in affirming the decree of the District Court of the United States for the District of Oregon dismissing appellant's bill of complaint and holding that appellant, a citizen and resident of the State of New York, was not entitled to dower in the lands described in said bill, of which lands appellant's husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and appellant's dower not otherwise lawfully barred), and in holding the Oregon laws, (Section 7306, L. O. L.), which limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, to be valid and constitutional notwithstanding the Oregon laws (Section 7286 L. O. L.) which entitle the widow of every deceased person to an estate of dower in such lands, and notwithstanding the provisions of Section 2 of Article IV of the Constitution of the United States of America, which entitle the citizens of each state to all the privileges and immunities of the several states.

II.

The Court erred in refusing to hold that appellant was entitled to an estate of dower in the lands described in said bill of complaint, of which lands her husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and appellant's right of dower not otherwise lawfully barred) pursuant to the provisions of the laws of Oregon, (Section 7286 Lord's Oregon Laws).

III.

The Court erred in refusing to hold invalid and unconstitutional the Oregon laws (Section 7306, L. O. L.) which purport to limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, as repugnant to the provisions of Section 2 of Article IV of the Constitution of the United States of America.

(Sgd.) CHARLES HALDANE,
(Sgd.) JAMES G. WILSON,
(Sgd.) GEO. B. GUTHRIE,
Solicitors for Evelyn P. Ferry.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY (a Citizen of the State of New York), Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and Central Trust Company of New York, a New York Corporation, Appellees.

Order Allowing Appeal.

Upon application of solicitors for Appellant and the filing of Appellant's Petition for Appeal on this 29th day of September, 1920,

It is ordered that the appeal of Evelyn P. Ferry, Appellant herein, to the Supreme Court of the United States, be and the same is hereby allowed as prayed for upon her filing her Undertaking on Appeal in the sum of Two Hundred and Fifty (250) Dollars.

(Sgd.) W. H. HUNT,
U. S. Circuit Judge.

[Endorsed:] Order allowing appeal to Supreme Court U. S. Filed September 29, 1920. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY (a Citizen of the State of New York), Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and Central Trust Company of New York, a New York Corporation, Appellees.

Undertaking on Appeal.

Know all men by these presents, That we, Evelyn P. Ferry, Appellant, and National Surety Company, a corporation of New York, as surety, are held and firmly bound unto Spokane, Portland & Seattle Railway Company, a Washington corporation, and Central Trust Company of New York, a New York corporation, in the sum of Two Hundred and Fifty Dollars, to be paid to said Appellees, their successors and assigns; to which payment we do bind ourselves and each of us, jointly and severally, and our and each of our heirs, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 1st day of October, 1920.

Whereas, the above-named Evelyn P. Ferry has appealed to the Supreme Court of the United States to reverse the order and decree of dismissal in the above-entitled cause entered by the United States Circuit Court of Appeals for the Ninth Circuit.

Now, therefore, the condition of this obligation is such, that if the above-named Evelyn P. Ferry shall prosecute said appeal to effect, and answer all costs that may be awarded against her, if she shall fail to make good her plea, then this obligation shall be void; otherwise in full force and virtue it shall remain.

(Sgd.) EVELYN P. FERRY,
(Sgd.) By JAMES G. WILSON,
One of Her Solicitors.
[SEAL.] NATIONAL SURETY COMPANY,
(Sgd.) By J. McDONALD,
Its Attorney in Fact.

Signed, sealed and delivered in our presence:

(Sgd.) RUTH SMALL,
(Sgd.) CICERO V. HOGAN.

[Endorsed:] Undertaking on appeal to Supreme Court U. S. Filed October 4, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3472.

EVELYN P. FERRY, Appellant,

vs.

SPOKANE, PORTLAND & EASTERN RAILWAY COMPANY, and CENTRAL TRUST COMPANY OF NEW YORK, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-seven (37) pages, numbered from and including 1 to and including 37, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

3472.

EVELYN P. FERRY (a Citizen of the State of New York), Appellant,

vs.

SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, a Washington Corporation, and Central Trust Company of New York, a New York Corporation, Appellees.

Citation on Appeal.

The President of the United States of America to Spokane, Portland & Seattle Railway Company, a Corporation, and to Central Trust Company of New York, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be held in the City of Washington,

District of Columbia, within sixty days from the date of this citation, to wit: On the 3d day of December, A. D., 1920, pursuant to a Notice of Appeal and order of the court allowing the same, filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Evelyn P. Ferry is Appellant, and Spokane, Portland & Seattle Railway Company and Central Trust Company of New York are Appellees, to show cause, if any there be, why the order and decree dismissing the Bill of Complaint filed by appellant as complainant should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William H. Hunt, United States Circuit Judge, this 4th day of October, A. D. 1920.

W. H. HUNT,
United States Circuit Judge.

UNITED STATES OF AMERICA,
District of Oregon, ss:

Due service of the within Citation on appeal is admitted at Portland, Oregon, this 7th day of October, 1920.

OMAR C. SPENCER,
CAREY & KERR,
Of Solicitors for Appellees.

[Endorsed:] Docketed. No. 3472. In the United States Circuit Court of Appeals for the Ninth Circuit. Evelyn P. Ferry (a citizen of the State of New York), Appellant, vs. Spokane, Portland & Seattle Railway Company, a Washington corporation, et al., Appellees. Citation on Appeal. Filed Oct. 9, 1920. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. Wilson & Guthrie, Attorneys at Law, 309 Platt Building, Portland, Oregon.

Endorsed on cover: File No. 27,998. U. S. Circuit Court Appeals, 9th Circuit. Term No. 641. Evelyn P. Ferry, appellant, vs. Spokane, Portland & Seattle Railway Company and Central Trust Company of New York. Filed December 7th, 1920. File No. 27,998.

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WM. R. STAN
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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 177.

EVELYN P. FERRY,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY AND CENTRAL TRUST COMPANY OF NEW YORK,

Appellees.

APPELLANT'S BRIEF.

ON APPEAL FROM U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT.

WILSON & GUTHRIE,
Platt Building, Portland, Ore.,
Solicitors for Appellant.

CHARLES HALDANE,
1974 Broadway, New York City,
Of Counsel.

FRANCIS L. PATTON, JR.,
40 Wall Street, New York City,
Of Counsel.

HENRY L. BRANT,
38 Park Row, New York City,
Of Counsel.

PRESS OF FREMONT PAYNE, Inc., 80 Washington St., New York City.

Supreme Court of the United States

EVELYN P. FERRY,
Appellant,
against
SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,
Appellees.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT (OREGON).

Statement of the Case.

This is an appeal from an order and decree of said District Court affirming a decree of said District Court dismissing the bill of complaint herein, on a motion in the nature of a demurrer by which it was urged that the bill of complaint herein stated no equity in favor of the appellant (pages 11-12).

The plaintiff in this action seeks to establish her right to dower in certain real property situated within the district of Oregon, as particularly described in the Bill of Complaint (pages 3-10).

This property was transferred by the appellant's husband, Clinton P. Ferry, without his wife, the appellant, joining in such conveyance.

The Bill of Complaint was dismissed in the Court below, on defendant's motion, on the ground that the plaintiff, as it appeared from the Bill, was

a non-resident of the State of Oregon at the time of the death of her said husband.

This was based upon Secs. 7286 and 7306 L. O. L., of the statutes of Oregon, which provide as follows:

> "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-half part of the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

This section is supplemented and limited by Sec. 7306, L. O. L., providing as follows:

> "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized, and the same may be assigned to her, or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death."

This statute last quoted was first construed by Judge Deady a number of years ago in the case of *Thornburn* vs. *Doscher,* 32 Fed., 812, to mean that a non-resident widow should have *no dower except* in lands of which her husband *died seized.* And this construction seems to have been followed by the Supreme Court of Oregon in the case of *Cunningham* vs. *Friendly,* 70 Oregon, 222, 139 Pacific, 928, thus giving to this positive section a negative interpretation.

On the authority of these cases the lower Court dismissed the bill of complaint, and the Circuit

Court of Appeals affirmed; and from such order this appeal has been taken to this Court.

Specification of Errors.

I.

The Court erred in affirming the decree of the District Court of the United States for the District of Oregon dismissing appellant's bill of complaint and holding that appellant, a citizen and resident of the State of New York, was not entitled to dower in the lands described in said bill, of which lands appellant's husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and appellant's dower not otherwise lawfully barred), and in holding the Oregon laws (Section 7306, L. O. L.), which limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, to be valid and constitutional notwithstanding the Oregon laws (Section 7286 L. O. L.), which entitle the widow of every deceased person to an estate of dower in such lands, and notwithstanding the provisions of Section 2 of Article IV of the Constitution of the United States of America, which entitle the citizens of each state to all the privileges and immunities of the several states.

II.

The Court erred in refusing to hold that appellant was entitled to an estate of dower in the lands described in said bill of complaint, of which lands her husband, Clinton P. Ferry, was seized of an estate of inheritance during their marriage (and appellant's right of dower not otherwise lawfully barred) pursuant to the provisions of the laws of Oregon (Section 7286 Lord's Oregon Laws).

III.

The Court erred in refusing to hold invalid and unconstitutional the Oregon laws (Section 7306, L. O. L.) which purport to limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, as repugnant to the provision of Section 2 of Article IV of the Constitution of the United States of America.

And further:

IV.

The Court also erred in refusing to hold invalid and unconstitutional the said Sec. 7306 of the laws of Oregon, which purport to limit dower to a widow residing out of the State of Oregon to lands only of which her husband died seized, as repugnant to the provisions of Sec. 1 of the 14th Amendment to the Constitution of the United States of America.

Points and Authorities.

I.

The "privileges and immunities" section of Art. IV, Sec. 2 of the United States Constitution and of the Fourteenth Amendment thereto protects citizens of other states in the enjoyment of substantial rights, and is not circumvented by statutes designed to discriminate on the mere basis of non-residence.

Corfield vs. Coryell, 6 Fed. Cas., 546.
Magill vs. Brown, 16 Fed. Cas., 408.
Paul vs. Virginia, 8 Wallace, 168.
Ward vs. Maryland, 12 Wallace, 418.
Blake vs. McClung, 172 U. S., 239.
Estate of Leland Stanford, 126 Calif., 112.
Estate of Mahoney, 133 Calif., 180.
Estate of Johnson, 139 Calif., 532.

Chalker vs. Birmingham & N. W. Ry. Co., 249 U. S., 522.
Travis vs. Yale & Towne Mfg. Co., 252 U. S., 60.
United States vs. Wheeler, 254 U. S., 281.

II.

"Citizenship" and "Residence," while not strictly synonymous, under all circumstances, are practically so, so far as they are used in the Oregon statutes and as they apply to the case at bar.

U. S. Constitution, 14th Amendment, Sec. I.
Chalker vs. Birmingham & N. W. Ry. Co., 249 U. S., 522.
Travis vs. Yale & Towne Mfg. Co., 252 U. S., 60.

III.

The right to succeed to property in one state by a citizen residing in another state is protected by Art. IV, Sec. 2 of the Federal Constitution and by the 14th Amendment thereto.

Magill vs. Brown, 16 Fed. Cas., 408.
Estate of Stanford, 126 Calif., 112.
Estate of Mahoney, 133 Calif., 180.
Estate of Johnson, 139 Calif., 532.

IV.

It is conceded that a state has full power over matters of succession to property within its jurisdiction and may, as to aliens, discriminate, or deny such rights.

Mager vs. Crima, 8 Howard, 490.

V.

A state has no right to penalize a person for removing from the state, either by fine or tax or the deprivation of any property-right based merely on such removal.

Crandall vs. Nevada, 6 Wallace, 36.
Slaughter House Cases, 16 Wallace, 36.
Chalker vs. Birmingham & N. W. Ry. Co., 249 U. S., 522.
Travis vs. Yale & Towne Mfg. Co., 252 U. S., 60.

VI.

The right of dower is just as fundamental and substantial as the right of inheritance or succession to property; and the states may not discriminate against citizens of other states in applying laws of dower, inheritance or succession.

Revised Statutes, U. S., Sec. 1978.
Magill vs. Brown, 16 Fed. Cas., 408.
Estate of Stanford, 126 Calif., 112.
Estate of Mahoney, 133 Calif., 180.
Estate of Johnson, 139 Calif., 532.

VII.

The right of dower is a property right, being, while inchoate, a chose in action, of which no citizen of the United States, wherever he may be resident, can be deprived without "due process of law" and as to which every person is entitled to the "equal protection of the laws," as provided in the Fourteenth Amendment of the Constitution.

Argument.

This is a pioneer case in this tribunal. This Court has never been called upon to pass upon the con-

stitutionality of these statutes of the state of Oregon, or of the somewhat similar statutes of two or three of the other Western States.

The specific question, therefore, now presented to this Court, for the first time, is as to whether a State can enact a law which discriminates, as between resident and non-resident widows, as to their right to dower in lands of which the husband was seized during coverture, but which he conveyed without his wife's consent or release, without violating the provisions of the Constitution of the United States.

Under Sec. 7286 of the Oregon Statutes, *every widow is entitled to dower* of "one-half part of all the lands whereof her husband was seized of an estate of inheritance *at any time during the marriage,* unless she is lawfully barred thereof."

But, under Sec. 7306 of this statute, as construed by the Oregon Courts, every widow who may chance to be a resident of any state other than Oregon at the time of her husband's death is barred of her dower-right in all lands which her husband may have conveyed during coverture without her release—even though, as in the case at bar, such dower-right may have *previously attached,* under Sec. 7286, by reason of her having been a resident of Oregon at the time when the property was *acquired or conveyed.*

The reason for this law, as suggested by Judge Deady in *Thornburn* vs. *Doscher* (supra), and as elaborated by the ingenuity of counsel for the appellee, is that in the days of the early history of Oregon, "men were more numerous than women and that they acquired real property and may have conveyed it by deed without disclosing the fact that in some distant state, there resided a wife whose

existence could not be easily ascertained by the grantee."

But can any valid reason or excuse be given for the enactment by any state of a law which conflicts with the provisions and principles of the Constitution of the United States?

And, if this were the reason, or could be a valid reason, for the enactment of this legislation, that condition has long since ceased to exist. Cessante ratione legis cessat ipsa lex—"Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself," as translated by Coke.

Furthermore, it can be shown on the trial of this action that the appellant, as the wife of Clinton P. Ferry, was not only a resident of Oregon when the property in question was acquired by him, but was well known as such in Oregon, the land records there showing that she not only owned real property in Oregon in her own name, but that she had joined with him as his wife in divers conveyances of real property in the state of Oregon and even in the city of Portland; and furthermore that he was not a citizen or resident of Oregon at the time of his death, if indeed at the time when the property in question was conveyed by him.

The case of *Thornburn* vs. *Doscher* (supra), in which Judge Deady first upheld these Oregon statutes, is distinguishable from the case at bar, in that the widow in that case was *never a resident of the state.* And he makes this significant reservation:

> "Cases may arise in which the time when the woman was non-resident with reference to the act of alienation by her husband, or even his death, may be material in the construction

> of this statute. But in this case, it appears that the woman never was a resident of the state, and therefore no such question can arise."

The ruling in that case should, therefore, in any event, be limited strictly to the facts there presented.

Appellant's contention, in brief, is:

1. That the Oregon statutes above mentioned give to residents of Oregon "privileges and immunities" denied to residents and citizens of all other States;

2. That these statutes deny to non-residents of Oregon the "equal protection of the laws," and

3. That these statutes deprive the non-resident of Oregon of her property "withut due process of law,"—*all in violation of her rights under the Constitution* of the United States.

The questions involved in this appeal may be considered under two heads:

1. Is dower a "privilege" within the meaning of the constitutional provisions; and

2. Can a citizen of any State of the Union be discriminated againset by the laws of any other State as to such property rights as descent, distribution or dower by reason of mere non-residence?

FIRST.—Is dower a "privilege"?

This is a question which, it would seem, has never come before this Court in its relation to the provisions of the Constitution.

It can scarcely be questioned that dower is a property-right, or interest in real estate, analogous to descent and distribution.

A widow's right of dower was long recognized by common law in England and is now governed by the Dower Act, 3 and 4 Will. IV, C. 105.

2 Sharswood Black. Com., 135, N.

"Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law."

1 Washburn Real Prop., 149.

"She (the widow) is entitled to one-third of all lands, tenements or hereditaments, corporeal or incorporeal, of which her husband may have been seized during the coverture, in fee or in tail."

2 Blackstone Com., 131.

"Until the death of her husband, this right remains a *chose in action.*"

4 Kent. Com., 61.

The right to dower is analogous in most respects to the right of inheritance. This, too, is an inchoate right. No person has a fundamental right to inherit property from a parent or from any other natural relation. The right of inheritance is wholly a creature of statute; and each State may, as to property within its jurisdiction, give, withhold or limit any right of inheritance or succession thereto. In this regard dower and inheritance stand on an equal footing, and any authority which recognizes inheritance as a right and awards it the protection of the Federal Constitution as to privilege or immunity, is equally an authority for the same protection of the right of dower.

The right to take property by inheritance or descent has frequently been referred to and classed, both by Federal and State Courts, as a "privilege."

The most recent case in which this has been so held by this Court is that of *Maxwell* vs. *Bugbee*, 250 U. S., 525, in which Mr. Justice Day, in delivering the opinion, quotes with approval from the opinion of Mr. Justice McReynolds in the case of *Magoun* vs. *Illinois Trust & S. Bank*, 170 U. S., 283, 288, that "the right to take property by devise or descent is the creature of the law, and not a natural right,—a *privilege.*"

In *Buchanan* vs. *Warley*, 245 U. S., 60, it is held as elementary that the "property" protected by the Constitution of the United States, Fourteenth Amendment, "includes not only the thing owned, but the right to acquire, use and dispose of it."

The Supreme Court of California has held directly and emphatically that the right of inheritance of property, as between residents and non-residents of the State, came clearly within the provisions of the Constitutition, as a "privilege."

Re Mahoney's Estate, 133 Calif., 180.
Re Johnson's Estate, 139 Calif., 532.

There would thus seem to be little doubt that dower is in the same class with inheritance, subject to the same legislative authority and subject to the same limitations and to the same protection under the various provisions of the United States Constitution.

SECOND.—Can a citizen of any state be discriminated against by the laws of any other state as to such property-rights as descent, distribution or dower by reason of mere non-residence?

To be more specific, can the appellant in this action be deprived of a dower-right given her by the statutes of Oregon and to which she was at one time entitled as a resident of Oregon, for no other reason than that she has since removed from Oregon and become a citizen of the State of New York?

It is conceded that each state has exclusive jurisdiction over all property, both real and personal, within its borders, and over matters of descent, distribution and dower. It can give or withhold as it may see fit, so long as it treats its own citizens and residents in the same manner and upon equal terms with citizens and residents of other states. But it cannot discriminate in favor of its own citizens and against those of other states. Oregon cannot be permitted to say, we shall give to any widow residing in Oregon dower of one-half in all property of which her husband was seized at any time during coverture, but to any widow who may be a resident of New York we will give a right of dower in only such property as her husband may not have disposed of during his lifetime.

If such a right could exist to the extent above mentioned, then it could be exercised in discriminating in varying degrees against or in favor of the residents and citizens of any or all of the other states of the Union. It might be declared that widows residing in the state of Washington, between which and the state of Oregon there might be some rivalry, should have no dower-right; that widows residing in Idaho might have one-half the dower which Oregon widows received; and that widows residing in Nevada should have twice the dower-rights of Oregon widows.

In the *Slaughter House cases*, 16 Wallace, 36, Mr. Justice Miller, in an able opinion, emphatically stated that among the so-called rights of citi-

zens of the United States was the right of any citizen of the United States to become a citizen of any state of the Union of his own volition by the establishment therein of a bone fide residence; and that in so doing the right of a citizen so to do was put beyond any abridgement on the part of any state.

The case of *Crandall* vs. *Nevada*, 6 Wallace 36, in which the opinion was also written by Mr. Justice Miller, held as unconstitutional certain laws of the state of Nevada under which that state attempted to impose a tax of $1 upon every person leaving the state.

The practical effect upon such a tax in money upon a citizen of the United States making a change of residence, whether permanent or temporary, is no different from the deprivation of an estate of dower, or any other property-right, for doing the same thing.

In the case of *Corfield* vs. *Coryell*, 6 Fed. Cas., 546, a statute of New Jersey was declared unconstitutional which declared that "it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state to rake or gather clams, oysters," etc.

In this case, Mr. Justice Washington, in delivering the opinion and stating what the "Privileges and immunities" of citizens in the several states are, mentions, among others, "the right to acquire and possess property of every kind"; "the right of a citizen of one state to reside in any other state"; "to take, hold and dispose of property, either real of personal"; and adding: "These, and many others which might be mentioned, are, strictly speaking, Privileges and Immunities; and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to

use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.

A little later, in the case of *Magill* vs. *Brown,* 16 Fed. Cas., 408, it was held that legatees could not be precluded from their bequests because residents of other states,—the Court saying:

"We can therefore make no distinction between these bequests (to non-residents) and those to societies located in the state: the disability of alienage cannot be applied to citizens, societies or corporations of other states, and they may enjoy property as it can be enjoyed of right by those which are within the state."

And again in the case of *Paul* vs. *Virginia,* 8 Wallace, 168, Mr. Justice Field says:

> "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminatng legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the aquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to consti-

tute the citizens of the United States one people as this."

A few years later, in the case of *Ward* vs. *Maryland*, 12 Wallace, 418, a statute of Maryland imposing upon non-residents of the state a larger license-tax than was imposed upon residents was declared unconstitutional, as creating a discrimination against *non-resident citizens*, under the Privileges and Immunities section of the constitution.

In this case there was no suggestion of citizenship, but it was purely a question of *residence*. Nevertheless the Court properly held that the Privileges and Immunities section of the constitution protected them.

In the later case of *Blake* vs. *McClung*, 172 U. S., 239, certain laws of Tennessee which sought to create a preference in favor of creditors who were *residents of that state*, giving them priority over the *residents of any other state or country*, were held invalid under the Privileges and Immunities section of the constitution; nor did the Court in that case overlook the circumstances of *residence* as distinguished from citizenship (see page 247).

The Court adopts the reasoning of Mr. Justice Washington in the early case of *Corfield* vs. *Coryell* and of Mr. Justice Baldwin in *Magill* vs. *Brown* and approves the opinons of *Paul* vs. *Virginia* and *Ward* vs. *Maryland*.

The case of *Blake* vs. *McClung* was again before the Court in 176 U. S., 59, in which Mr. Justice Harlan delivered the unanimous opinion. This opinon brought before the Court further discussion of the discrimination when dealing with resident citizens as opposed to non-resident citizens, and clearly establishes that a non-resident citizen is

entitled to the protection of the Privileges and Immunities section as against a statute which attempts to impose a discrimination upon him because of non-residence and not that of citizenship.

The recent case of *LaTourette* vs. *McMaster*, 248 U. S., 465, while seemingly at variance with some of the principles enunciated in the earlier cases, is not really so. In that case a statute of South Carolina requiring a person seeking an insurance broker's license to have been a resident of that state for two years, was held to be valid on the ground that there were substantial reasons why a residence of two years should be exacted as preliminary to the important business of an insurance broker, and that it was within the police power of the State.

In that case Mr. Justice McKenna, in sustaining the statute, and referring to the distinction made by the Court below between residence and citizenship, says:

> "But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt *it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the Court would so construe it; and in no event would the Court sanction an evasion of the purpose and intent of this wise and wholesome provision of the constitution based on mere verbiage.* But there is nothing in the act to suggest any such intention. On the contrary, the words 'residents' and 'citizens' are both used, each apparently in its ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one

that is sanctioned by the highest judicial authority" (italics are ours).

It is to be noted that in the statute under consideration the word "residents" only is used, thus showing that the legislature had in mind no distinction between residents and citizens. So that, as remarked by Mr. Justce Pitney in *Travis* vs. *Yale & Towne Mfg. Co.*, 252 U. S., 60, "if it discriminates against all non-residents, it has the necessary effect of including in the discrimination those who are citizens of other states."

In *Chalker* vs. *Birmingham & N. W. R'y. Co.*, 249 U. S., 522, it is held that a statute of Tennessee "imposing a higher privilege tax on construction companies having their chief office outside the state than on those having it within the state, violates the constitution of the United States, Article 4, Section 2, insuring equal privileges and immunities to citizens of the several states, since the classification is arbitrary and in practical effect discriminates against citizens of other states."

The still more recent case of *Maxwell* vs. *Bugbee*, 250 U. S., 525, upholding a statute of New Jersey regulating inheritance taxes, though involving discrimination between residents and non-residents in regard to inheritance taxes, is not controlling in this case. The statute in that case was upheld on other grounds,—among others, that this was not a tax on property but on the succession, which is there characterized as a "privilege."

But even in that case Mr. Justice Holmes, in a dissenting opinion, in which he was joined by the Chief Justice and by Justices Van Devanter and McReynolds, says:

> "New Jersey could not deny to residents in other states the right to take legacies which it granted to its own citizens; and therefore its power to prohibit all legacies cannot be invoked in aid of a principle which affect the foreign residents only."

In the recent case of *Travis* vs. *Yale & Towne Mfg. Co.* (supra), it was held that the New York Income Tax Law, in granting to residents a personal exemption of $1,000, if single, and $2,000, if married, but allowing no exemption to *non-residents*, was violative of Art. IV, Sec. 2, of the United States Consitution, *notwithstanding the distinction between the terms residents and citizens.*

Mr. Justice Pitney, in delivering the opinion in that case and referring to the cases of *Paul* vs. *Virginia* and *Ward* vs. *Maryland*, says:

> "Of course the terms resident and citizen are not synonymous, and in some cases the distinction is important (*LaTourette* vs. *McMaster*, 248 U. S., 465-470); but a general taxing scheme such as the one under consideration, *if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other states;* and, if there be no responsible ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled. In *Blake* vs. *McClung*, 172 U. S., 239, 247 and 176 U. S., 59, 67, the Court held that a statute of Tennessee declaring the terms upon which a foreign corporation might carry on business and hold property in that state, which gave to its cre-

ditors residing in Tennessee priority over all creditors *residing* elsewhere, without special reference to whether they were citizens or not, must be regarded as contravening the 'privileges and immunities' clause."

"The nature and effect of the crucial discrimination in the present case are manifest. Sec. 362, in the case of residents, exempts from taxation $1,000 of the income of a single person, $2,000 in the case of a married person, and two hundred additional for each dependent. *A non-resident taxpayer has no similar exemption.*"

"This is not a case of occasional or accidental inequality due to circumstances personal to the taxpayer (Citing authorities), but a general rule, *operating to the disadvantage of all non-residents, including those who are citizens of the neighboring states, and favoring all residents, including those who are citizens of the taxing state.*" (Italics are ours.)

The latest pronouncement of this Court on the constitutional questions here involved seems to be in the case of *United States* vs. *Wheeler*, 254 U. S., 281, in which Mr. Chief Justice White, in delivering the opinion and commenting upon the meaning and effect of the constitutional provisions here under consideration, quotes with approval from the opinions in *Paul* vs. *Virginia* and *Ward* vs. *Maryland* (supra).

Should this statute of Oregon be upheld as constitutional, it would seem as if the door would be opened to any state of the Union to pass any legislation that it might choose discriminating as to property-rights in favor of its own citizens and

against the residents and citizens of any or all of the other states of the Union.

The practical effect of such laws would be to disrupt the harmony and destroy the mutual friendship which were some of the announced purposes of the Colonies in adopting the Articles of Confederation and which object was carried into the Constitution of the United States, as so often referred to in the opinions of this Court.

The decree of the Court below should be reversed and this case be remanded for trial on the merits.

New York, February 20, 1922.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1923.

No. [illegible]

[illegible]

Appellant,

vs.

[illegible] Railroad Company,

Appellee.

Appeal from the [illegible] Circuit Court of [illegible] for the [illegible] Circuit.

[illegible]

No. 177

In the

Supreme Court of the United States

October Term, 1921

EVELYN P. FERRY
Appellant

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY
Appellee

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

Brief for Appellee, Spokane, Portland and Seattle Railway Company

STATEMENT.

This suit was brought by Evelyn P. Ferry, widow, against Spokane, Portland and Seattle Railway Company and Central Trust Company of New York for assignment of dower and accounting. The Trust Company was not served and did not appear. Spokane, Portland and Seattle Railway Company filed motion to dismiss on the grounds that the complaint does not state any matter of equity entitling the plaintiff to the relief prayed for; nor are the facts as stated sufficient to entitle the plaintiff to any relief against that defendant.

The points specified were as follows:

First: That it appears from the complaint that the husband of the plaintiff did not die seized of the real property described therein and it does not appear that the plaintiff resided in the State of Oregon at the time of her husband's death.

Second: That it appears from the complaint that the plaintiff's claim is stale and that by reason of laches and want of equity she is not entitled to the relief prayed. (12.)

The complaint was dismissed and the plaintiff appealed to the Circuit Court of Appeals for the Ninth Circuit where the decree of the District Court was affirmed.

The opinion discussed the first of the above points, holding that in Oregon a wife's nonresidence at the time of the death of her husband bars her right of dower in any lands conveyed by him during his lifetime, and that the Oregon act covering this, as construed by the Oregon courts, is not invalid. It was held that this view of the main question left it unnecessary to consider the question of laches in bringing the suit. (26.) From the decree entered in accordance with the opinion this appeal is taken.

POINTS AND AUTHORITIES.

1. The statute of Oregon governing dower of non-residents was adopted in 1854, before the state was admitted to the Union. It was Section 7306 of Lord's Oregon Laws, but is now Section 10073 of Oregon Laws, as follows:

> "A woman being an alien shall not on that account be barred of her dower; and any woman residing out of the state shall be entitled to dower of lands of her deceased husband lying in this state of which her husband died seized, and the same may be assigned to her or recovered by her, in like manner as if she and her deceased husband had been residents within the state at the time of his death."

The statutes of Oregon also provide (Section 7286, Lord's Oregon Laws, now Section 10053 of Oregon Laws), as follows:

> "The widow of every deceased person shall be entitled to dower, or the use during her natural life, of one-half part of all the land whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

Section 10073 has been construed in both federal and state courts of Oregon to the effect that a woman not a resident of the state is not entitled to dower in the lands therein of which her husband did not die seized.

Thornburn v. Doscher, 32 Federal, 810.
Cunningham v. Friendly, 70 Ore. 222.
Woolsey v. Draper, 201 Pac. 730.

Practically the same construction has been given to the same or to similar statutes in the following decisions:

Pratt v. Tefft, 14 Mich. 191.

Ligare v. Semple, 32 Mich. 438.

Stringer v. Dean, 61 Mich. 203.

Bennett v. Harms, 51 Wis. 251; modified in *Ekegren v. Marcotte*, 159 Wis. 539.

Atkins v. Atkins, 18 Neb. 174.

Miner v. Morgan, 83 Neb. 400.

Burr v. Finch, 91 Neb. 417.

Buffington v. Grosvenor, 46 Kan. 730.

The right of a state to define marital property rights as between residents and non-residents is directly recognized by the Supreme Court.

Conner v. Elliott, 18 How. 508.

There is a just ground for the distinction between residents and non-residents in the statute and therefore Section 2 of Article IV of the Federal Constitution does not apply, as is shown by the reasoning in the following recent tax cases:

LaTourette v. McMaster, 248 U. S. 465.

Maxwell v. Bugbee, 250 U. S. 525.

Travis v. Yale & Towne Mfg. Co., 252 U. S. 60.

Shaffer v. Carter, 252 U. S. 37.

Anderson v. Durr, Adv. Dec., Dec. 1, 1921, p. 18.

In view of the fact that these decisions are recent, and the court has therein had occasion to consider earlier decisions, and to settle the question of the difference between residence and citizenship under the Equal Privileges provision of the Constitution, further citations in this brief will be omitted.

2. The statute of limitations as to the right of a dower claimant as against the husband's grantee in possession would begin to run from the time of the husband's death.

Britt v. Gordon (Iowa), 11 Am. & Eng. Ann. Cas. 407, and note.

There is no artificial rule as to limitations in a court of equity, and each case as it arises must be determined by its own particular circumstances.

McQuiddy v. Ware, 20 Wall. 14.

Courts of equity frequently treat the lapse of time, even for a shorter period than the one specified in the statute of limitations, as a presumptive bar to the claim.

Godden v. Kimmell, 99 U. S. 201.

ARGUMENT.

I.

The Constitutional Question.

The question presented by the appellant is whether the Oregon statute, Section 10073, in discriminating between resident and non-resident widows is valid as construed by the federal and state courts in that state. That there is a fair basis for a distinction between residents and non-residents is shown by the decision of Judge Deady in *Thornburn v. Doscher*, 32 Federal 812, the reasoning of which was apparently accepted and adopted (but without discussion) by the Supreme Court of Oregon in *Cunningham v. Friendly*, 70 Oregon 222, and again in the recent decision, *Woolsey v. Draper*, 201 Pacific 730, which was rendered by the Oregon Supreme Court November 15, 1921.

In the opinion in the *Thornburn* case, Judge Deady followed the decision of the Michigan Supreme Court, from which state the statute was derived.

In *Pratt v. Tefft*, 14 Mich. 191, the statute was construed as providing that a woman might bar her dower by non-residence and that a woman residing out of the state at the time of her husband's death was not entitled to dower of lands of which he had been seized, but

which he had conveyed away without her joining in that deed.

This construction was reaffirmed in *Ligare v. Semple*, 32 Mich. 438, and *Stringer v. Dean*, 61 Mich. 203.

The same construction was adopted in Wisconsin as to a similar statute, although the court later modified its view in some respects, not material here.

Bennett v. Harms, 51 Wis. 251.

Ekegren v. Marcotte, 159 Wis. 539.

The statute was adopted in Oregon in 1854. The decision of the United States District Court of Oregon was rendered in 1887. The rule of property thus established has been recognized without question for a third of a century. The ground of the discrimination was thus stated by Judge Deady:

> "By a necessary implication the section denies to a non-resident woman the right to dower of lands of which her husband was not seized at the time of his death.
>
> "Cases may arise in which the time when the woman was non-resident with reference to the act of alienation by her husband, or even his death, may be material in the construction of this statute. But in this case it appears that the woman never was a resident of the state, and therefore no such question can arise.
>
> "It rests with the legislature to say what interest, if any, married persons shall

have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may, for the security of titles, and the protection of innocent purchasers, provide that a non-resident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man.

"This very case appears to be a good illustration of the wisdom of the provision. Thornburn was probably a transient person. His wife was unknown; and probably the fact that he had one was never even suggested. To subject persons buying property of him under such circumstances to a claim of dower in after years might well be thought inexpedient, if not unjust, and, therefore the legislature has denied it.

"In *Bennett v. Harms*, 51 Wis. 251, 8 N. W. Rep. 222; *Pratt v. Tefft*, 14 Mich. 191, and *Ligare v. Semple*, 32 Mich. 438, this question arose under a similar statute, and it was held that the widow was not entitled to dower."

Dower may be defined by the legislature, and given to or withheld from any class of widows, unless citizens of other states are denied privileges and immunities in this regard enjoyed by citizens of Oregon. But, assuming that that exception is a limitation on the legislative power to define dower, still this statute is valid.

Whether widows are citizens of Oregon or are citizens of some other state is not made the criterion by the statute. The distinction therein is not based upon citizenship, but upon residence in or out of the state, and as the constitutional provision regarding privileges and immunities relates only to discriminations between citizens it has no application unless residence and citizenship are to be deemed synonymous expressions and are identical in fact. A person residing out of the State of Oregon may be

(a) A citizen of Oregon,

(b) A citizen of some other state,

(c) An alien.

But to confine dower (in cases where the husband does not die seized), to widows residing in the state, is by no means to confine dower in such cases to citizens of the state. There are resident widows, for example, who are citizens of other states; there are resident widows whose husbands did not reside in Oregon long enough before death to become citizens; and there are alien resident widows. To provide all such resident widows with dower in lands whether or not held until death by the husbands, and at the same time to deny dower to women residing out of the state excepting in lands of which the husbands died seized, in

no manner abridges privileges or rights on the basis of citizenship. Citizens of Oregon may or may not have dower in lands aliened by their husbands before death, depending upon residence in the state; and citizens of other states have the same right, since their dower likewise depends upon residence. In other words, as to all lands, excepting those of which a husband dies seized, dower is a right that exists if the widow is a resident, and that does not exist if she is not a resident; and in neither case does her citizenship cut any figure.

In view of the clear and convincing statement as to the sound basis for this statute, given by the District Judge, himself a pioneer of the Territory of Oregon, it would seem that appellant's claim that the discrimination is arbitrary and capricious, needs more than mere assertion. This statute was adopted in 1854 and has governed the right of dower in lands of that state for sixty-five years. In the State of Oregon, especially in the early period of its history, men were more numerous than women. Men acquired real property and may have conveyed it by deed, without disclosing the fact that in some distant state there resided a wife, whose existence could not be ascertained by the grantee. Afterward, there would be suits involving the question of possible marital rights

of non-resident women who claimed marriage, difficult to disprove but ultimately shown fraudulent. The question for the Oregon legislature in 1854 was whether purchasers for value should be protected against dower claims of non-resident widows. Clearly it was reasonable, in protecting the stability of land titles and in safeguarding investments, to make the right of dower dependent upon residence in the state unless the husband continued to own the land to the time of his death. In the very case at bar, Mrs. Ferry begins her suit ten years after the death of her husband and fourteen years after the land was conveyed, and now claims dower in lands used for railroad terminal purposes. She was a non-resident at the time of the conveyance, and has been such until the present time, and had not been a resident of the State of Oregon for some years prior to the death of her husband. (Appellant's Brief in Circuit Court of Appeals, page 2.) We submit that the appellant's demand shows the sound basis for the distinction recognized by Judge Deady as the basis of the statute by the Oregon Legislature.

II.

Laches.

The bill of complaint does not show diligence. There is nothing alleged to show that the plaintiff did not know of the deed in 1905 to Security Savings and Trust Company, or the deed in 1906 to the Railway Company. Both deeds were duly recorded. They both purported to convey the land in fee simple. The land was taken possession of, and was, according to the complaint, claimed to be free from any claim or right on the part of the plaintiff. It comprises a portion of the property of the Railway Company used for railroad purposes, and is in continuous use. It was also mortgaged with other property, and the mortgage was duly recorded. (Record, pp. 6 and 7.)

The suit was begun by filing the complaint July 31, 1919, which was the last day of ten years from the date of Mr. Ferry's death, July 31, 1909. Ten years is the period of limitations in actions at law concerning real estate in Oregon, but this court is free to decide whether the laches and acquiescence of the plaintiff is sufficient ground for dismissal.

The statute of limitations as to the husbands' grantee in possession would begin to run from the date of the husband's death.

Britt v. Gordon, (Iowa), 11 Am. & Eng. Ann. Cas. 407, and Note.

But there is no artificial rule as to the limitations in a court of equity, and each case as it arises must be determined by its own particular circumstances.

McQuiddy v. Ware, 20 Wall. 14.

Courts of equity frequently treat the lapse of time even for a shorter period than the one specified in the statute of limitations as a presumptive bar to the claim.

Godden v. Kimmell, 99 U. S. 201.

The very nature of the use and possession of the appellee of the property was such as to indicate a claim of ownership, which indeed is admitted by the express statement of the complaint. The trackage on the lot in question could not be disrupted and divided upon assignment of dower without serious loss and irreparable injury, nor could the property be sold without interference with a public use to which it is devoted.

Under these circumstances the suit should be dismissed.

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